Supreme Court, U.S.
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No. 93-564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KIDDER, PEABODY & CO.,

Petitioner,

v.

COOPERATIVA DE AHORRO Y CREDITO AGUADA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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BRIEF IN OPPOSITION

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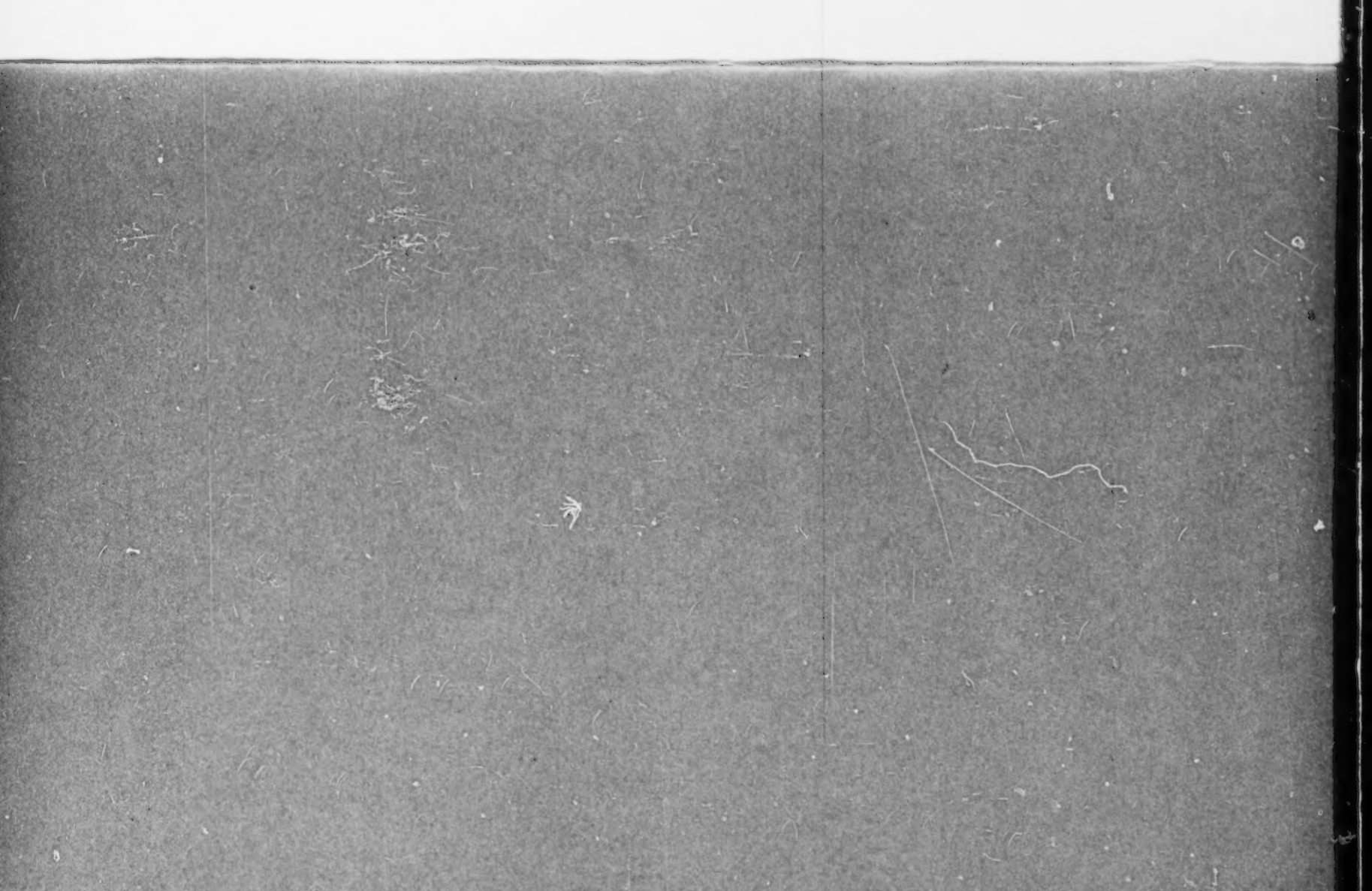

RESPONDENT'S RESTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether at the time of the enactment of Section 27A of the Securities Exchange Act of 1934, ***15 U.S.C. 78aa-1 (Supp. III 1991),*** the district court's judgment in this case was final in any respect creating a vested property right in that judgment, notwithstanding the pendency of an appeal.

2. Whether Section 27A of the Securities Exchange Act of 1934, ***15 U.S.C. 78aa-1 (Supp. III 1991),*** violates the separation of powers doctrine.

PARTIES TO THE PROCEEDINGS BELOW

The parties before the United States Court of Appeals for the First Circuit were Cooperativa de Ahorro y Credito Aguada,[1] Respondent herein; Kidder, Peabody & Co., Petitioner herein; Paine Webber Incorporated, Ramon M. Almonte, Mayleen Gratacos and the Community Property Partnership existing between the last two.[2]

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[1] Cooperativa de Ahorro y Credito Aguada is a small one branch savings and loan cooperative organized and existing under the laws of the Commonwealth of Puerto Rico.

[2] Defendants-Appellees Paine Webber Incorporated, Ramon M. Almonte, Mayleen Gratacos and the Community Property existing between the last two are neither Petitioners nor Respondents to this petition.

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BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for writ of certiorari filed by Petitioner, seeking review of the First Circuit's judgment in this case.

OPINIONS BELOW

The opinion of the court of appeals, ***Pet. App. A-1,*** is reported at ***993 F.2d 269 (1st Cir. 1993).*** The opinion of the district court, ***Pet. App. A-9***, is reported at ***799 F.Supp. 261 (D.P.R. 1992).***

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1993. Petitioner requested an extension of time of ten days, until June 14, 1993, to file a Petition for Rehearing and a Suggestion that the Case be Reheard En Banc, ***Pet. App. A-22.*** The court of appeals granted the extension requested on June 1, 1993. ***Pet. App. A-24.*** On June 10, 1993, Petitioner filed a Petition for Rehearing, with a Suggestion that the Case be Heard En Banc. ***Pet. App. A-25.*** The Petition was denied on June 23, 1993. On September 13, 1993, Justice Souter extended the time within which to file a petition for a writ of certiorari until October 11, 1993. ***Pet. App. A-56.*** The jurisdiction of this Court is invoked by Petitioner under 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

Section 27A of the Securities Exchange Act of 1934, as amended by Section 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991, ***15 U.S.C. Sec. 78aa-1 (Supp. III 1991):***

> (a) *Effect on pending causes of action.*—The limitation period for any private civil action implied under section 78j of this title that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) *Effect on dismissed causes of action.*—Any private civil cause of action implied un-

> der [section 10(b)] that was commenced on or before June 19, 1991—
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in its jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991.

STATEMENT OF THE CASE

On December 28, 1989, Cooperativa de Ahorro y Credito Aguada filed a complaint in the United States District Court for the District of Puerto Rico against Petitioner Kidder Peabody & Company, stockbroker Ramon Almonte and Paine Webber Incorporated. Petitioner alleged violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78j(b), and Securities Exchange Commission Rule 10b-5, 17 C.F.R. Sec. 240.10b-5; RICO, 18 U.S.C. Sec. 1962(a), (b) and (c); as well as pendent local fraud claims.

On January 30, 1991, the district court dismissed all RICO claims against Petitioner and Paine Webber, all but one RICO claim against Almonte, and all causes of action for securities law violations against Paine Webber. ***Cooperativa de Ahorro y Credito Aguada v. Kidder, etc., 758 F.Supp. 64 (D.P.R. 1991).*** On that same date, the district court stayed Respondent's securities law claims against Petitioner

and Almonte pending a decision by this Court in ***Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, ___ U.S. ___, 111 S.Ct. 2773 (1991); Cooperativa de Ahorro y Credito Aguada v. Kidder, etc., 758 F.Supp. at 80.***

On June 20, 1991, this Court issued its decision in ***Lampf, Pleva,*** holding that private actions under Section 10(b) are subject to a uniform federal limitations period drawn from section 9(e) of the 1934 Act, ***15 U.S.C. 78i(e).*** Under that provision, a suit may not be brought more than one year after the fraud is discovered or more than three years after it occurs. ___ U.S. at ___, ***111 S.Ct. at 2782.*** On that same day, this Court also decided ***James B. Beam Distilling Co. v. Georgia, ___ U.S. ___, 111 S.Ct. 2439 (1991),*** in which it disallowed the use in civil litigation of "selective prospectivity"—the practice of applying a new judicial interpretation of the law in the case in which it is announced but not applying it to other pending suits.

Based on ***Lampf, Pleva*** and ***Beam,*** the district court issued a second Opinion and Order and entered judgment on October 31, 1991, dismissing Respondent's Section 10(b) claims as time barred. ***Cooperativa de Ahorro y Credito Aguada v. Kidder Peabody & Co., 777 F.Supp. 153 (D.P.R. 1991).*** In that order the district court also dismissed the remaining RICO claims and refused to assume pendent jurisdiction over the state claims. ***Id.*** On November 27, 1991, Respondent filed a Notice of Appeal from the judgment entered in the district court on October 31, 1991. ***Pet. App. A-42.***

On December 19, 1991, while that appeal was pending, Congress enacted legislation adding ***Section 27A,***

15 U.S.C. 78 aa-1 (Supp. III 1991), to the 1934 Act. ***See Federal Deposit Insurance Corporation Improvement Act of 1991 (the "FDIC Improvement Act"), Pub. L. No. 102-242, Sec. 476, 105 Stat. 2387.*** Subsection (a) of Section 27A makes applicable, to Section 10(b) actions that were pending when ***Lampf*** was decided, the limitations period that had prevailed in the particular jurisdiction before ***Lampf. 15 U.S.C. 78aa-1(a) (Supp. III 1991).***

Because the enactment of Section 27A and Respondent's motion for reinstatement of the federal securities claims would have the effect of reopening the case before the district court, the "finality" of the judgment of the district court for purposes of an appeal was no longer present. Therefore, on December 27, 1991, Respondent filed a motion before the First Circuit Court of Appeals, requesting the dismissal of the then pending appeal, without prejudice. On December 31, 1991, the court of appeals entered the dismissal of the appeal.

On December 27, 1991, Respondent also filed a motion in the district court requesting reinstatement of its federal securities claims, pursuant to Section 27A. ***Pet. App. A-47.*** With Respondent's claims before it a second time, the district court set out to apply the pre-***Lampf*** statute of limitations, which in this case was the two year provision of the Puerto Rico Securities Act, ***10 L.P.R.A. Sec. 890(e). Cooperativa de Ahorro y Credito Aguada v. Kidder Peabody & Co., 799 F.Supp. 261, 263 (D.P.R. 1992).*** This two year limitation was subject to equitable tolling under the doctrine of fraudulent concealment, which provides that "the statute of limitations applicable to claims under Section 10(b) and rule 10b-5 begins to

run when an investor, in the exercise of reasonable diligence, discovered or should have discovered the alleged fraud." ***General Builders Supply Co. v. River Hill Coal Venture, 796 F.2d 8, 11 (1st Cir. 1986).***

Although the district court referred to Respondent's motion for reinstatement as a "***Fed. R. Civ. P. 60(b)*** motion for reconsideration", ***Cooperativa, 799 F.Supp. at 262,*** it went on to apply ***Fed. R. Civ. P. 12(b)*** standard, "[l]ooking at the facts in a light most favorable to [Respondent] and taking them as true". ***Id. at 264.*** Relying extensively on articles in the national press, submitted by neither party, the district court concluded that the statute of limitations commenced to run from the very date of the purchase of the securities by Respondent, and found that the complaint failed to state a timely claim under Puerto Rico's two-year statute of limitations. Accordingly, it dismissed Respondent's Section 10(b) claims a second time. ***Cooperativa de Ahorro y Credito Aguada v. Kidder 799 F.Supp. at 264-66.*** Respondent appealed the second dismissal, arguing, among other things, that the district court's reliance on materials outside of the pleadings occurred improperly and was not a valid basis for dismissing its claim.

Notwithstanding the enactment of Section 27A, Petitioner urged the court of appeals to affirm. Petitioner argued before the court of appeals, as it does now before this Court, that the application of Section 27A to the case at bar violates the doctrine of separation of powers by interfering with the judgment of the district court and deprives it of a constitutionally protected right inherent to a final judgment.

The court of appeals, holding that the district court improperly relied on materials not within the pleadings in reaching its decision, reversed the dismissal and remanded the case. ***Cooperativa de Ahorro y Credito Aguada v. Kidder Peabody & Co., 993 F.2d 269 (1st Cir., 1993). Pet. App. A-1.*** As to Petitioner's constitutional challenges to Section 27A, the court of appeals noted that a party's property right in a cause of action does not vest until a final and unreviewable judgment has been obtained. ***Id. at 273 n. 11. Pet. App. A-8.***

SUMMARY OF THE ARGUMENT

Petitioner argues that the court of appeal's decision deprived it of a constitutionally protected vested right in a final judgment. However, it is well settled that a judgment does not become final while an appeal is pending. At the time Section 27A became law and Respondent filed its motion for reinstatement of the Section 10(b) claims, the judgment of the district court was pending appeal before the court of appeals.

Even assuming *in arguendo* that the district court judgment had become final, Section 27A does not deprive Petitioner of any vested right. Congress is empowered to revive causes of action after a limitations period has expired and statutes of limitations do not go to the merits nor do they involve fundamental rights. The revival of personal civil causes of action which do not involve the creation of title does not offend Fourteenth Amendment notions of due process.

Petitioner also argues that Section 27A violates the doctrine of separation of powers. But, as numerous federal courts have held, Section 27A does not violate

the doctrine of separation of powers. Section 27A merely revises the applicable limitation period for Section 10(b) claims commenced on or before June 19, 1991. Section 27A does not revive any judgment entered by the courts; Section 27A is within the large category of statutes that simply alter the law in response to judicial interpretation.

REASONS FOR DENYING THE WRIT

Petitioner contends that Section 27A violates the doctrine of separation of powers and deprives it of a constitutionally protected vested right inherent in a final judgment. ***Pet. 10-15.*** Because the judgment of the district court was not final at the time when Section 27A became law and at the time Respondent requested reinstatement of its federal securities claims, and because the decision below is correct and consistent with the decisions of this Court, this Court's review is not warranted.

I. PETITIONER DID NOT HAVE A FINAL JUDGMENT AND SECTION 27A, THEREFORE, DOES NOT DEPRIVE PETITIONER OF A VESTED RIGHT

Petitioner's constitutional arguments are premised on the alleged finality of the judgment of the district court dismissing Respondent's Section 10(b) causes of action. The linchpin of Petitioner's arguments is that the judgment of the district court dismissing Respondent's Section 10(b) securities claims was final when 27A was enacted and at the time of Respondent's motion for reinstatement of its Section 10(b) claims. Petitioner's premise is incorrect.

On October 31, 1991, the judgment dismissing all pending federal and state claims was entered in the district court. On November 27, 1991, Respondent

filed its Notice of Appeal from that judgment. On December 19, 1991, Section 27A became law. On December 27, 1991, Respondent filed its motion for reinstatement of the Section 10(b) securities claims. On December 31, 1991, the Order of the First Circuit Court of Appeals was issued dismissing Respondent's appeal.[3] Thus, at the time Section 27A was enacted and Respondent filed its motion for reinstatement of the Section 10(b) securities claims, the judgment of the district court was subject to an appeal pending before the First Circuit Court of Appeals and was, therefore, not final.

Petitioner counters this by arguing that since Respondent did not appeal the part of the district court's judgment dismissing the Section 10(b) claims, at the time Section 27A was signed into law the part of the district court's judgment dismissing the Section 10(b) claims had become final and Petitioner had therefore somehow acquired a constitutionally protected vested right in part of the judgment. Petitioner is mistaken.

As noted by the court of appeals, a party's property right in a cause of action does not vest until a final unreviewable judgment has been obtained. ***Cooperativa de Ahorro y Credito Aguada v. Kidder, 993 F.2d at 273 n. 11, Pet. App. A-8; Hammond v. United States, 786 F.2d 8, 12 (1st Cir. 1986); Hoffman v. City of Warwick, 909 F.2d 608, 621 (1st Cir. 1990).***

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[3] *The dismissal of the appeal was based on a motion for voluntary dismissal of the appeal filed on December 27, 1991 by Respondent as a result of the enactment of Section 27A and the motion for reinstatement filed thereunder.* ***Pet. App. A-44.***

It is well settled that "[a]n appeal is not a new suit in the appellate court, but a continuation of the suit in the court below." ***Gulf Ref. Co. v. United States, 269 U.S. 125, 137 (1925).*** It is "a proceeding in the original cause," and as such, "is but a step toward the final adjudication of the original cause, which the law allows quite as much as it allows a defense in the first instance." ***Id.; Mackenzie v. A. Engelhard & Sons Co., 266 U.S. 131, 142 (1924).*** Thus, "the suit is pending until the appeal is disposed of," and "until disposition any judgment appealed from it is still 'sub judice'." ***Mackenzie v. A. Engelhard & Sons Co., 266 U.S. at 142-43; Colorado Interstate Gas v. Natural Gas Pipeline, 962 F.2d 1528, 1534 (10th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 414 (1992).***

At the time Section 27A was signed into law and Respondent filed its motion for reinstatement of the Section 10(b) claims the judgment of the district court was pending appeal before the First Circuit Court of Appeals. Accordingly, Petitioner's argument that Section 27A deprives it of "its constitutionally protected vested right inherent in a final judgment" ***(Pet. 13-17)*** is without merit. Thus, this Court's review of the judgment of the court of appeals is not warranted.

II. EVEN IF THE DISTRICT COURT'S JUDGMENT WAS FINAL, SECTION 27A DOES NOT DIVEST PETITIONER OF A CONSTITUTIONALLY PROTECTED VESTED RIGHT IN A FINAL JUDGMENT

Petitioner argues that application of Section 27A(b) to the case at bar deprived it of a constitutionally protected vested right in a final judgment. ***(Pet. 13-15).*** As previously discussed, ***infra, pp. 8-10,*** at the time Section 27A was signed into law the judgment

was not final because it was the subject of an appeal before the First Circuit Court of Appeals. Nevertheless, even assuming, *arguendo*, that the judgment had become final, Section 27A does not unconstitutionally deprive Petitioner of a vested right in the judgment.

When, as in the instant case, a judgment is the result of the application of a defense of statute of limitations, the vested rights doctrine has no application. It has long been recognized by this Court and accepted by federal courts generally that unless the passage of a statute of limitations creates a prescriptive property right, such as title in adverse possession, Congress is free to revive a cause of action after the limitations period has expired. ***See Brown v. Hutton Group, 795 F.Supp. 1307, 1315 (S.D.N.Y. 1992), citing, Campbell v. Holt, 115 U.S. 620 (1885); Adler v. Berg Harmon Associates, 790 F.Supp. 1234, 1242-43 (S.D.N.Y. 1992); Axel Johnson v. Andersen, Inc., 790 F.Supp. 476 (S.D.N.Y. 1992), aff'd 6 F.3d 78 (2d Cir. 1993).*** In ***Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945),*** this Court reaffirmed the vitality of ***Campbell,*** and found that the revival of a personal civil cause of action which did not involve the creation of title did not offend Fourteenth Amendment notions of due process.

As this Court further noted with respect to statutes of limitation "[t]heir shelter has never been regarded as what is now called a 'fundamental' right . . . the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." ***Brown v. Hutton Group, 795 F.Supp. at 1316, citing, Chase Securities Corp. v. Donaldson, 325 U.S. at 314.***

Moreover, statutes of limitations "are by definition arbitrary, and their operation does not discriminate between the just and the unjust, or the voidable and avoidable delay." ***Id.*** "Legislation to alter such a technical defense, and its application even to dismissed cases, goes far less to the heart of the judicial function than would a legislative attempt to reverse adjudications which had addressed the true merits of the disputes in question." ***Id.; Axel Johnson v. Andersen, Inc., 790 F.Supp. at 484.***

In addition to the arguments set forth above, it is noteworthy that ***Fed. R. Civ. P. 60(b)(6)*** permits a court to relieve a party from final judgment where there is a post judgment change in the law having retroactive application. ***See Matarese v. Lefevre, 801 F.2d 98, 106 (2d Cir. 1986), cert. denied, 480 U.S. 908 (1987).*** Because Section 27A provides for a retroactive application in the law, this action may also be reinstated under ***Rule 60(b)(6). See Axel Johnson v. Andersen, Inc., 790 F.Supp. at 482.***

III. SECTION 27A DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE

Petitioner also argues that Section 27A is unconstitutional because, in upsetting Petitioner's purportedly final judgment, Congress violated the doctrine of separation of powers. ***(Pet. 10-13).*** Respondent disagrees.

As held by numerous courts which have addressed this issue, Section 27A does not violate the doctrine of separation of powers, as it does not direct certain factual findings or imposes a rule of decision for Section 10(b) claims, nor does it remove or alter the constitutional adjudicatory function of the courts. ***See,***

e.g., Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567 (11th Cir. 1992); Anixter v. Home-Stake Production Co., 977 F.2d 1533 (10th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1841 (1993); Wegbreitt v. Morley Orchards, 793 F.Supp. 965 (E.D.Wash. 1992); Brown v. Hutton, supra; Adler v. Berg Harmon Assoc., supra; Axel Johnson v. Arthur Andersen, supra. Instead, Section 27A prescribed a new period of limitations for the judiciary to apply to all Section 10(b) litigation pending on June 19, 1991. ***See, e.g., Anixter, 977 F.2d at 1545; Henderson, 971 F.2d at 1573.*** By so doing, Congress was exercising a key legislative power, that is, the enactment of a statute of limitations. ***Anixter, 977 F.2d at 1546.***

When Section 27A was enacted, the limitations period for private Section 10(b) claims was the federal rule borrowed from Section 9(e) adopted by this Court in ***Lampf.*** Section 27A changes the statute of limitations for cases filed prior to ***Lampf*** by replacing the borrowed federal rule with the limitations period previously applicable in each jurisdiction. As this Court noted in ***Musick, Peeler & Garrett v. Employers Ins. of Wausau, ___ U.S. ___, 113 S.Ct. 2085, 2089 (1993),*** "Congress did no more than direct the applicable 'limitation period for any private civil action implied under section 78j(b) of this title [Sec. 10(b) of the 1934 Act] that was commenced on or before June 19, 1991 [the day prior to issuance of ***Lampf, Pleva***]'." Thus, Section 27A does not revise a judgment of this Court; it belongs to the large category of statutes that alter the law in response to judicial interpretation. ***See West Virginia Univ. Hosp., Inc. v. Casey, ___ U.S. ___, 111 S.Ct. 1138, 1154-1155***

(1991) (Stevens, J., dissenting); Eskridge, Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 424-441 (1991).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: November 29, 1993